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14 UNITED STATES DISTRICT COURT

15 NORTHERN DISTRICT OF CALIFORNIA

16 NETSKOPE, INC.,

17 Plaintiff,

18 vs.

19 FORTINET, INC.,

20 Defendant.

Case No. 3:22-cv-01852-JSC

**FORTINET, INC.'S MOTION TO
DISMISS THE COMPLAINT FOR
FAILURE TO STATE A CLAIM**

**MEMORANDUM OF POINTS AND
AUTHORITIES**

Date: July 14, 2022

Time: 9:00 a.m.

Place: 450 Golden Gate Avenue, San
Francisco, California 94102

Judge: Hon. Jacqueline Scott Corley

Courtroom: 8

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on July 14, 2022, at 9 a.m., or as soon thereafter as the matter may be heard, in Courtroom 8 of the United States District Court for the Northern District of California located at 450 Golden Gate Avenue, San Francisco, California 94102, before the Honorable Judge Jacqueline S. Corley, Defendant Fortinet, Inc. (“Fortinet”) will, and hereby does, bring this Motion to Dismiss the Complaint for Failure to State a Claim.

STATEMENT OF REQUESTED RELIEF

Fortinet seeks an order dismissing the “Complaint for Declaratory Judgment of Non-Infringement U.S. Patent Nos. 10,237,282, 9,225,734, 11,032,301, 10,826,941, 8,793,151, and 9,197,601” filed by Plaintiff Netskope, Inc. (“Netskope”) on the ground that its barebones and conclusory allegations fail to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

This motion is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, and such further evidence and argument as may be submitted prior to or at the hearing before this Court.

DATED: June 7, 2022

Respectfully submitted,

QUINN EMANUEL URQUHART & SULLIVAN, LLP

By: /s/Andrew M. Holmes

Andrew M. Holmes

Attorneys for Fortinet, Inc.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **STATEMENT OF ISSUE TO BE DECIDED**

3 This motion presents the following issue for decision:

4 1. Should Netskope's complaint be dismissed for failure to state a claim where Netskope
5 has failed to plead factual allegations that would give rise to a plausible claim for a declaration of non-
6 infringement, such as a specific claim limitation that is not met by Netskope's products and the reason
7 it is not met, and instead has pleaded only the ultimate conclusions of non-infringement that it asks the
8 Court to draw?

9 **PRELIMINARY STATEMENT**

10 Fortinet respectfully requests that Netskope's complaint for a declaratory judgment of non-
11 infringement of six Fortinet patents be dismissed because Netskope fails to meet the pleading
12 requirements for a non-infringement claim.

13 Netskope's complaint misrepresents the parties and their interactions leading up to the filing of
14 this action. Fortinet was founded in 2000 with a mission to innovate, develop, and provide deep
15 cybersecurity protection technology for business customers.¹ Fortinet's focus on building the best
16 security products has resulted in Fortinet's operating success over the past twenty years, with its
17 employees, customers, and sales steadily growing. Over the years, Fortinet has shipped over 8.4
18 million units of its security products to over 500,000 customers. This success is based on a foundation
19 of innovation and technological excellence. Fortinet was recognized by Gartner (the same publication
20 also cited in Netskope's complaint, *id.* ¶¶ 31-33) as a "LEADER" in two "Magic Quadrant" categories
21 (network firewalls and WAN edge infrastructure); further praised in four additional categories (web
22 application and API protection; SIEM; wired and WLAN; and endpoint protection platforms); and an
23 honorable mention in two more categories (secure web gateway and indoor location services).
24 Fortinet's innovation is further demonstrated by its portfolio of over 1,200 issued patents, including
25 more than 900 U.S. patents. Moreover, Fortinet's innovation extends to cloud-based security
26 products. For example, Fortinet's virtual machine ("VM") FortiGate has been a staple of cloud

27 ¹ See, e.g., <https://www.fortinet.com/content/dam/fortinet/assets/brochures/FortinetBroch.pdf>.
28

1 deployments since Fortinet’s early days, and Fortinet has been issued numerous patents on cloud -
 2 based technologies.

3 Netskope similarly mischaracterizes the parties’ interactions. Fortinet patiently negotiated
 4 with Netskope for many months in an effort to reach a reasonable business solution and avoid
 5 litigation. In contrast, Netskope engaged in a protracted series of delay tactics. And when those delay
 6 tactics no longer served Netskope’s purpose, it rushed to the courthouse with a facially deficient
 7 complaint that is long on factual misstatements and mischaracterizations, but devoid of any substance
 8 that would reflect a reasonable prefiling investigation of Netskope’s alleged non-infringement.

9 Netskope’s allegations of non-infringement are plainly inadequate because they plead only the
 10 conclusory allegation of the ultimate conclusion that they seek: “Netskope does not infringe, nor has it
 11 infringed, any claim of the Patents-in-Suit.” Compl., ¶ 208; *see also* ¶¶ 226-228, 236-238, 246-248,
 12 256-258, 266-268, 276-278. Although Netskope’s complaint speculates as to certain categories of
 13 products it believes may be accused of infringement (without pleading that those products have ever
 14 actually been accused of infringement), merely identifying a category of products and a patent and
 15 alleging that the products do not infringe the patent is insufficient to state a claim for a declaratory
 16 judgment of non-infringement. Rather, the plaintiff must identify and explain—*at absolute bare*
 17 *minimum*—why at least one specific limitation is not practiced by the accused product or its use.
 18 Netskope has not identified even a single limitation of any claim that it contends is not practiced by its
 19 products or their use, much less alleged why the limitation is not met. Accordingly, Netskope’s
 20 complaint should be dismissed.

21 THE COMPLAINT’S RELEVANT FACTUAL ALLEGATIONS

22 On March 24, 2022, Netskope filed this declaratory judgment action against Fortinet, seeking
 23 declarations that “Netskope does not directly or indirectly infringe, nor has it directly or indirectly
 24 infringed, any claim” of six patents, each of which is assigned to Fortinet (the “Patents-in-Suit”).
 25 Compl. ¶¶ 231, 241, 251, 261, 271, 281. The complaint is replete with factual misstatements and
 26 mischaracterizations regarding the parties and their interactions before the filing of this action, and
 27 Fortinet reserves the right to address those misstatements and mischaracterizations at the appropriate
 28 time. However, for purposes of the present motion, the complaint alleges in relevant part that:

- 1 • “On October 22, 2021, Fortinet sent Netskope a letter accusing Netskope of infringing
- 2 three Fortinet patents: U.S. Patent Nos. 10,237,282; 9,225,734; and 11,032,301.” *Id.* ¶
- 3 48.
- 4 • On February 7, 2022, Fortinet “accused Netskope of infringing three more patents
- 5 (U.S. Patent Nos. 10,826,941; 8,793,151; 9,197,601).” *Id.* ¶ 117.
- 6 • On March 24, 2022, Netskope informed Fortinet that “Netskope had decided to file
- 7 [this] declaratory judgment action of noninfringement.” *Id.* ¶ 199.

8 Importantly, and dispositive with respect to the relief sought by this motion, the complaint
9 does *not* allege:

- 10 • Any specific limitation of any specific claims of any of the six Patents-in-Suit that is
- 11 not practiced by any of Netskope’s products or their use; or
- 12 • How or why Netskope’s products do not practice any specific limitation of any
- 13 specific claim of any of the six Patents-in-Suit.

14 Indeed, the only allegations set forth in the complaint, with respect to non-infringement of
15 each of the six patents, are the following conclusory statements:

16 “Netskope does not infringe any claim of the [at issue] Patent.”
17 Compl., ¶¶ 226, 236, 246, 256, 266, 276;

18 “Netskope and its products have not and do not directly or indirectly
19 infringe any claim of the [at issue] Patent.”
20 Compl., ¶¶ 227, 237, 247, 257, 267, 277; and

21 “Netskope and its products have not and do not infringe any claim of
22 the [at issue] Patent literally or under the doctrine of equivalents.”
23 Compl., ¶¶ 228, 238, 248, 258, 268, 278.

24 These conclusory allegations are legally insufficient to state a claim for declaratory judgment
25 of non-infringement.
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ARGUMENT

I. THE COMPLAINT MUST BE DISMISSED BECAUSE ITS BALD ASSERTIONS THAT NETSKOPE DOES NOT INFRINGE THE PATENTS-IN-SUIT FAIL TO STATE A CLAIM.

A. The *Iqbal*/*Twombly* Pleading Standard Applies to Netskope’s Complaint for Declaratory Judgement of Non-Infringement.

To survive a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, “a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotations omitted); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A complaint fails to state a claim when there is a “lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.” *Conservation Force v. Salazar*, 646 F.3d 1240, 1242 (9th Cir. 2011) (quoting *Balistreri v. Pacifica Police Dep’t.*, 901 F.2d 696, 699 (9th Cir. 1988)). Although a court must accept as true all well-pleaded allegations of material fact in the complaint, *Daniels-Hall v. Nat’l Educ. Ass’n*, 629 F.3d 992, 998 (9th Cir. 2010), it is not required to credit “allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.” *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008) (quoting *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001)); *Iqbal*, 556 U.S. at 681 (bare assertions that amount to nothing more than a “formulaic recitation of the elements” of a claim “are conclusory and not entitled to be assumed true”). If the facts alleged do not support a reasonable inference of liability, the claim must be dismissed. *See Iqbal*, 556 U.S. at 678-79.

To plead a direct infringement claim that passes muster under *Iqbal* and *Twombly*, a plaintiff must allege facts indicating how the defendant’s accused products practice each of the limitations found in at least one asserted claim. *See, e.g., e.Digital Corp. v. iBaby Labs, Inc.*, No. 15-cv-05790-JST, 2016 WL 4427209, at *3-4 (N.D. Cal. Aug. 22, 2016) (dismissing direct infringement claim where plaintiff failed to allege facts showing that the accused products practiced *all* limitations of an exemplary asserted claim); *Scripps Research Inst. v. Illumina, Inc.*, No. 16-cv-661 JLS-BGS, 2016 WL 6834024, at *6 (S.D. Cal. Nov. 21, 2016) (dismissing infringement claim where allegations did not explain how the accused product met the claim limitations).

1 A claim for declaratory relief of non-infringement is essentially the “mirror image” of an
 2 infringement claim, *Comcast Cable Commc’ns, LLC v. OpenTV, Inc.*, 319 F.R.D. 269, 273 (N.D. Cal.
 3 2017), and courts have accordingly held declaratory judgment plaintiffs (and counterclaimants) to the
 4 same pleading standard. *See, e.g., id.*; *The Beer Barrel, LLC v. Deep Wood Brew Prods., LLC*, No.
 5 2:16-cv-00440-DN-BCW, 2016 WL 5936874, at *5 (D. Utah Oct. 12, 2016); *Tannerite Sports, LLC v.*
 6 *Jerent Enters., LLC*, No. 6:15-cv-00180-AA, 2016 WL 1737740, at *5 (D. Or. May 2, 2016); *RAH*
 7 *Color Techs. LLC v. Ricoh USA Inc.*, 194 F. Supp. 3d 346, 352 (E.D. Pa. 2016); *Deerpoint Grp., Inc.*
 8 *v. Acqua Concepts, Inc.*, No. 1:14-cv-01503-SAB, 2014 WL 7178210, at *3-4 (E.D. Cal. Dec. 16,
 9 2014); *PageMelding, Inc. v. ESPN, Inc.*, No. C 11-06263 WHA, 2012 WL 3877686, at *2 (N.D. Cal.
 10 Sept. 6, 2012). Thus, to meet the *Iqbal/Twombly* pleading standard, a complaint for declaratory
 11 judgment of non-infringement “should include specific factual allegations about how [the plaintiff’s]
 12 products do not infringe [the defendant’s] patents rather than a single conclusory statement that ‘[the
 13 plaintiff’s] Products do not and have not infringed on any valid and enforceable claim of Defendants’
 14 Patents.’” *The Beer Barrel*, 2016 WL 5936874, at *5.²

15 The *Iqbal/Twombly* standard also applies to claims seeking a declaratory judgment of no
 16 indirect infringement, including induced and contributory infringement. *See, e.g., PageMelding*, 2012
 17 WL 3877686, at *2-3 (citing *In re Bill of Lading*, 681 F.3d at 1336); *TSMC Tech., Inc. v. Zond, LLC*,
 18 No. 14-721-LPS-CJB, 2015 WL 661364, at *6 n.11 (D. Del. Feb. 13, 2015) (citations omitted).

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 23 ² Prior to December 1, 2015, Form 18 of the Appendix of Forms to the Federal Rules of Civil
 24 Procedure governed the pleading standard for both direct infringement claims and claims for
 25 declaratory judgment of no direct infringement. *See, e.g., In re Bill of Lading Transmission and*
 26 *Processing Sys. Patent Litig.*, 681 F.3d 1323, 1334-36 (Fed. Cir. 2012). With the Supreme Court’s
 27 abrogation of Rule 84 of the Federal Rules of Civil Procedure (which had endorsed the Appendix of
 28 Forms), courts now overwhelmingly apply the *Iqbal/Twombly* pleading standard to both direct
 infringement claims and claims for declaratory judgment of no direct infringement. *See, e.g.,*
e.Digital Corp., 2016 WL 4427209, at *2-3; *Windy City Innovations, LLC v. Microsoft Corp.*, 193 F.
 Supp. 3d 1109, 1114 (N.D. Cal. 2016); *The Beer Barrel*, 2016 WL 5936874, at *5; *Tannerite Sports*,
 2016 WL 1737740, at *5; *RAH Color Techs. LLC v. Ricoh USA Inc.*, 194 F. Supp. 3d. at 352-53.

B. Netskope’s Complaint Fails to Allege Sufficient Facts to State a Claim Under the *Iqbal*/*Twombly* Pleading Standard Because It Does Not Identify a Single Limitation of Any Claim of the Patents-in-Suit that Netskope Alleges Is Not Met by a Specific Product and Because It Does Not Explain Why that Limitation Is Not Met.

Netskope’s complaint fails to state a claim for a declaratory judgment of non-infringement because, with respect to non-infringement, it merely recites the bald assertion that “Netskope and its products have not and do not directly or indirectly infringe any claim of [the Patents-in-Suit].” Compl. ¶¶ 227, 237, 247, 257, 267, 277. Although the complaint speculates that certain categories of Netskope’s products may be accused of infringement, *e.g., id.* ¶¶ 225, 235, 245, 255, 265, 275, the complaint does not identify a single limitation of a single claim that Netskope alleges is not met by a specific product (or even its products more generally) or the use of any of its products, much less explain why that limitation is not met by any of its products or their use. Indeed, Netskope’s complaint does not give even the slightest hint of Netskope’s non-infringement theories. *See id.*; *see also* ¶¶ 226-228, 236-238, 246-248, 256-258, 266-268, 276-278 (all allegations relating to non-infringement and all lacking any explanation as to why or how there is no infringement). Because these allegations do not reasonably support an inference of non-infringement, the complaint must be dismissed. *See Iqbal*, 556 U.S. at 678-79; *Deerpoint*, 2014 WL 7178210, at *4 (“Conclusory statements and recitation of the elements of a claim are not sufficient to state a cognizable claim.” (citing *Iqbal*, 556 U.S. at 678)).

Courts have consistently dismissed claims for declaratory judgment of non-infringement based on allegations that are substantively identical to, and even considerably more substantive, than the allegations in Netskope’s complaint. *See, e.g., Comcast Cable*, 319 F.R.D. at 272-73 (allegations identifying the accused services and limitations they did not meet were insufficient to state a plausible claim for relief because “it is impossible to infer . . . even a general idea of what the [accused] services are, much less how they fail to meet the [cited] limitation[s]”); *RAH Color Techs. LLC v. Ricoh USA Inc.*, 194 F. Supp. 3d at 351-53 (allegations that defendant “has not infringed and does not infringe, either directly, indirectly, contributor[il]y, or by inducement, any valid and enforceable claim of the [asserted] patent either literally or under the doctrine of equivalents, willfully, or otherwise” were insufficient to plead a counterclaim for declaratory judgment of non-infringement); *The Beer Barrel*,

1 2016 WL 5936874, at *5 (description of the plaintiff’s products and a conclusory allegation that they
 2 did not infringe any of the defendant’s patents insufficient to state a claim); *Deerpoint*, 2014 WL
 3 7178210, at *4 (allegations reciting sixteen “reasons” to find no infringement or invalidate the
 4 patent—*e.g.*, “as shown by the file wrappers, . . . [patentee] is estopped from claiming that the patents
 5 cover or include any apparatus or device or product or method manufactured, used, or sold by [the
 6 declaratory judgment plaintiff]”—were simply “conclusory statements with no supporting factual
 7 allegations” and insufficient to state a plausible claim for relief).

8 Netskope’s complaint similarly falls short of stating a claim for indirect infringement because
 9 it fails to allege facts that, if true, would establish that it did not indirectly infringe. *See, e.g.*,
 10 *PageMelding*, 2012 WL 3877686, at *3 (no claim stated for indirect non-infringement because “ESPN
 11 has not alleged any facts, that if true, would lead to a reasonable inference that it did not intend
 12 another party to infringe the patent-at-issue.”); *In re RAH Color Techs. LLC Patent Litig.*, 2019 WL
 13 2342191, at *6 (observing that “a supplier suing for declaratory of no induced infringement” could
 14 plead its claim “by providing [patentee-prepared] claim charts that allege direct infringement by the
 15 supplier’s customer and that cite to supplier-provided ‘user guides and documentation for each claim
 16 element’” (quoting *DataTern*, 755 F.3d at 905)); *see also DataTern*, 755 F.3d at 906 (patentee-
 17 supplied claim charts insufficient to create actual controversy regarding contributory infringement
 18 because, “[f]or example, they do not imply or suggest that [the supplier’s product] is not ‘a staple
 19 article or commodity of commerce suitable for substantial non-infringing use,’” as would be required
 20 for patentee to plead claim of contributory infringement against supplier) (citing 35 U.S.C. § 271(c)
 21 (2012)). Although Netskope need not **admit** these additional elements of indirect infringement, it
 22 must plead some factual basis to suggest that Fortinet contends these elements are met. Netskope has
 23 not done so. *See, e.g.*, ¶¶ 227, 237, 247, 257, 267, 277 (“Netskope and its products have not and do
 24 not directly or indirectly infringe any claim of the [at issue] Patent.”).

25 Completely devoid of **any** factual allegations explaining what Netskope’s products are and
 26 why they do not practice even a single limitation of the claims of the Asserted Patents, Netskope’s
 27 complaint relies solely on conclusory allegations that it is entitled to a declaratory judgment of non-
 28 infringement because it does not infringe Fortinet’s patents. For each of the six patents for which

1 Netskope seeks a declaration of non-infringement, the entirety of Netskope's allegations consist of the
 2 following conclusory statements:

- 3 • "Netskope does not infringe any claim of the [at issue] Patent."
 4 Compl., ¶¶ 226, 236, 246, 256, 266, 276.
- 5 • "Netskope and its products have not and do not directly or
 6 indirectly infringe any claim of the [at issue] Patent."
 7 Compl., ¶¶ 227, 237, 247, 257, 267, 277.
- 8 • "Netskope and its products have not and do not infringe any claim
 9 of the [at issue] Patent literally or under the doctrine of
 10 equivalents."
 11 Compl., ¶¶ 228, 238, 248, 258, 268, 278.

12 These allegations plainly fail to plead a plausible non-infringement claim under *Iqbal* and
 13 *Twombly*. See, e.g., *Comcast Cable*, 319 F.R.D. at 274 ("The simple fact is that Comcast knows how
 14 its own products and services work and can easily show in its pleadings how, specifically, a single
 15 claim limitation is absent from each accused product or service. It must comply fully with the
 16 requirements of *Twombly/Iqbal* as to all counts[.]"). Netskope's complaint should be dismissed on the
 17 ground that it fails to state a claim.

18 CONCLUSION

19 For all of the foregoing reasons, Fortinet respectfully submits that the Court should dismiss
 20 Netskope's complaint in its entirety.
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1 DATED: June 7, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of June, 2022, I electronically filed the foregoing document with the clerk of the court for the U.S. District Court, Northern District of California, San Francisco Division, using the electronic case filing system of the Court. The electronic case filing system sent a "Notice of Electronic Filing" to the attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means.

/s/Andrew M. Holmes